SUMMARY OF PROCEEDINGS

HEARING ON 1961 LEGISLATIVE PROGRAM OF THE CALIFORNIA LAW REVISION COMMISSION

December 1 - 2, 1960
Sacramento, California

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SUMMARY OF TESTIMONY PRESENTED AT A HEARING OF THE ASSEMBLY INTERIM COMMITTEE ON JUDICIARY-CIVIL ON THE 1961 LEGISLATIVE PROGRAM OF THE CALIFORNIA LAW REVISION COMMISSION - DECEMBER 1 and 2, 1960 SACRAMENTO, CALIFORNIA

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PART I EVIDENCE IN EMINENT DOMAIN CASES

(The Commission recommends revisions of the law relating to evidence in eminent domain cases that will, according to the Commission, eliminate uncertainties in the law and bring judicial practice into conformity with modern appraisal practice.)

Witnesses testifying in order of presentation:

A. John H. DeMoully, Executive Secretary, California Law Revision Commission.

B. Joseph B. Harvey, Assistant Executive Secretary, California Law Revision Commission.

C. Stanley E. Tobin, Attorney for Hill, Farrer and Burrill, Consultants to the California Law Revision Commission.

The principal determination to be made in an eminent domain proceeding is the market value of the property that is to be taken or damaged for public use. The generally accepted view has been that this determination should be based on the opinions of persons qualified to form a reliable opinion of the value of the property, i.e., the owner of the property and expert witnesses. In determining the value of property, the modern appraiser considers many factors. Yet the California courts have not permitted expert witnesses in eminent domain proceedings to testify concerning many factors that a modern appraiser takes into consideration in determining the market value of the property.

To eliminate uncertainties in the law relating to the determination of market value, and to bring judicial practice into conformity with modern appraisal practice, the Commission makes the following recommendations:

1. Evidence of value in eminent domain cases should continue to be limited to the opinions of qualified experts (which, under California law, includes the owner of the property that is subject to condemnation). There has been uncertainty whether evidence of comparable sales is direct evidence of value upon which the trier of fact may base a finding or whether such evidence is received merely to explain and substantiate opinion evidence. The practical effect of this uncertainty is that trial courts have made conflicting decisions upon the question of whether a jury can find a value completely outside the range of opinion testimony in reliance upon some evidence of comparable sales that has been introduced. It should be made clear that value is to be established only be expert testimony and that the jury cannot find a value on the property outside the range of expert opinion evidence. Any other rule would unduly prolong the trial and permit the jury to speculate as to property value when they are not competent to do so (section 1248.1(a)).

2. An expert should be permitted to give the reasons for his opinion on direct examination (section 1248.1(a)).

3. An expert should be permitted to state the facts and data upon which he relied in forming his opinion whether or not he has personal knowledge of such matters. This is the practice at the present time, but it is desirable to make the rule explicit so that it may be

clear that the hearsay rule is inapplicable to such testimony when it is introduced solely in explanation of the witness's opinion (section 1248.1(a)).

4. In formulating and stating his opinion as to the value of the property, an expert should be permitted to rely on and testify concerning any matter that a willing, well-informed purchaser or seller would take into consideration in determining the price at which to buy or sell the property. As the court is trying to determine the "market" value of the property, it should consider, and this is the most important part of the proposed statute, only those factors that would actually be taken into account in an arm's length transaction in the market place. In modern appraisal practice, there are three basic approaches to the determination of value. These involve: a) consideration of the sales prices of comparable property and other market data; b) the capitalization of the income attributable to the property; and c) the cost of reproducing the improvements on the property less depreciation and obsolescense. Specific statutory recognition should be given to these methods of appraising property as they are relied upon extensively to determine market value outside the courtroom. Under present law an expert is not ordinarily permitted, on direct examination, to use the capitalization and cost of reproduction approach in testifying as to market value (section 1248.2).

The test of a willing buyer and a willing seller, being an objective test, would preclude an expert from relying on personal considerations of the owner of the property or the need of the condemner to obtain the property in determining market value. Such factors are not generally considered by buyers and sellers on the open market in determining the value of property.

Finally, notwithstanding the willing buyer and willing seller tests, the statute specifically provides that an expert, in formulating or stating his opinion, cannot rely on or testify concerning those items for which, under present law, compensation is not given. Thus moving expenses or loss of business, since they are not compensable items now, could not be considered by the expert in determining market value. The Commission is not attempting to broaden those elements for which compensation can be given (section 1248.3(f)).

5. Certain factors that are of doubtful validity in their bearing on value should be specifically excluded from consideration in determining value to remove any doubt concerning the admissibility of an opinion based on these factors. These all encompassed in section 1248.3, include:

a. Sales to persons that could have acquired the property by condemnation for the use for which it was acquired. Such a sale does not involve a willing buyer and a willing seller.

b. Offers between the parties to buy or sell the property to be taken or damaged. Pretrial settlement of condemnation cases would be greatly hindered if the parties were not assured that their offers during negotiations would not be evidence against them.

c. Offers or options to buy or sell the property to be taken or any other property by or to third persons, except to the extent that offers by the owner of the property subject to condemnation constitute admissions and thus are admissible under evidence law. An unaccepted offer is not an indication of market value because it does not indicate a price at which both a willing buyer and a willing seller can agree.

d. Valuations assessed for purposes of taxation cannot be relied upon as an indication of market value.

e. Opinions as to the value of comparable property because their consideration would require the determination of many other collateral questions involving the weight to be given such opinions which would unduly prolong the trial of condemnation cases.

D. Leslie R. Tarr, Chairman, California State Bar Committee on Condemnation

E. Richard L. Huxtable, Acting Secretary, California State Bar Committee on Condemnation

Except for minor provisions not herein included and the material listed below, Mr. Tarr and Mr. Huxtable, not speaking for the State Bar, concur with the recommendations of the Law Revision Commission.

1. Section 1248.1 (a) of the proposed statute states the existing rule that value may be proved by opinions of qualified persons and that the owner is "presumed" qualified. This section should be clarified in two respects: First, the words "presumed to be" should be deleted. A presumption is often rebuttable and it could be contended under the present language that an owner, upon a showing that he doesn't live on the property, or did not purchase the property but inherited it, should not be permitted to express his opinion. Second, the provision should expressly permit an officer of a corporation which owns the property or property interest to testify.

2. Section 1248.2 (b) makes it proper for an expert to consider sales or a "contract to sell" comparable property in rendering his opinion as to market value. This provision should be qualified to prohibit consideration of a contract to sell which is not intended

to effect possession of title in a reasonable time. These contracts to sell in the future with no present change of possession are almost always influenced by tax considerations and personal motivations.

3. Section 1248.2 (e) permits consideration of capitalization of rents but not of income or profits attributable to any business conducted on the property. Modern custom and usage in many commercial classes of property fixes rents at a percentage or other measurable portion of gross sales or business on the property. Such is a rental and is not related to the speculative element of "profits", yet the language presently proposed would seem to exclude such capitalization. This should be corrected.

4. Section 1248.2 (f) permits consideration of the cost of reproducing improvements where the improvements "enhance the value of the land for its highest and best use". As an example, if the land would be worth $50,000 if vacant and available for industrial use, but is only worth $40,000 for commercial use because of a $1,000,000 office building on the property, it is obvious that the building, considered separately, does not "enhance the value of the land for its highest and best use". Under this section the land would be valued at $50,000. Yet the true value of the property is $1,040,000. Evidence of the cost of reproducing such improvements should be admissible if the improvement increases the value of the land. The section should provide, as an alternative way of compensating property owners for improvements, for the admissibility of evidence of the sales price of the improvement if the highest and best use of the land requires that the existing improvement be removed.

5. Section 1248.3(c) prohibits consideration of offers or options to buy or lease the subject property or comparable properties. This proposed rule will change the existing rule and should not be adopted in its existing form.

An offer to purchase the subject property should be admissible if it is (a) bona fide, (b) by a person who is able and willing to buy, and (c) the terms thereof are such that the transaction, if the offer was accepted, would be reasonably certain of consummation.

An offer to purchase, or a listing of another property, a prior sale of which has been placed in evidence, should be admissible for the limited purpose of showing that the prior sale is not an accurate indicant of present market value.

6. Section 1248.3 (e) prohibits the expression of an opinion of the value of other properties in the area. This is a proper statement of present law but should be clarified to permit an appraiser to apportion the sales price of a transaction in evidence between land and improvements, for purposes of comparison with the property to be condemned.

7. Section 1248.3 (f) makes it improper for the property owner or his witnesses to consider "noncompensible items of damage or injury". This provision should either be deleted or made equitable in its application by making it improper for the condemner or its witness to omit a consideration of a compensable item.

F. Hodge L. Dolle, Secretary, California State Bar Committee on Condemnation

Except for minor provisions not herein included and the material listed below, Mr. Dolle, not speaking for the State Bar, concurs with the recommendations of the Law Revision Commission.

1. As Mr. Tarr and Mr. Huxtable stated, Section 1248.2 (f) of the proposed statute permits consideration of the cost of reproducing improvements only where the improvements "enhance the value of the land for its highest and best use". The phrase "for its highest and best use" should be eliminated as it deprives the owner of the value of these improvements.

G. Richard A. Del Guercio, Deputy County Counsel, Los Angeles County

The Board of Supervisors of Los Angeles County concurs with the recommendations of the Law Revision Commission except as to the material below.

1. Section 1248.1 (a) of the proposed statute allows evidence of comparable sales to be admitted only to explain and substantiate opinion evidence. Such sales are not independent evidence under this section.

There is no other jurisdiction in the United States which permits sales prices to be received as evidence of value in which those sales prices are not independent evidence. This is also true in the local federal courts. There is no logical reason whatsoever for relegating comparable sales prices--which are the best evidence of value, even superior to the opinions of witnesses--to an inferior status.

2. Section 1248.1 (a) allows an expert in an eminent domain proceeding to state his opinion as to the value of property whether or not he has personal knowledge thereof. This precludes the trial court from its present function of exercising discretion in the admission of evidence. Under the proposed statute evidence will come in even though it has no credibility.

3. It is presently the law that in ascertaining the value of the property sought to be condumned, the influence of the proposed public improvement upon the value of the property to be condemned or upon comparable property is excluded. The proposed statute would change this.

4. Section 1248.2 places the three basic methods of determining fair market value: a) comparable sales; b) capitalization; and c) reproduction cost less depreciation on an equal basis insofar as admissibility of expert evidence is concerned. Comparable sales are, however, the best approach to finding fair market value of the property.

The main reason for the judicial and economic recognition of the superiority of the sales approach over the income capitalization method is the impossibility of accurately determining the capitalization rate. The capitalization rate is determined by and depends upon the ratio between sales prices and income. If sales are not available, an accurate capitalization rate cannot be determined. If sales are available, a capitalization study is not necessary for the sales approach can be used. A capitalization method, in such a case, merely adds to the confusion of court and jury while prolonging the trial.

Also less desirable than comparable sales is the reproduction cost less depreciation approach. It has a number of inherent weaknesses. It applies only to improved property. It frequently involves extreme difficulty in determining a fair rate of depreciation.

The present law should not be changed for it now recognizes that where comparable sales are available, the comparable sales approach is and should be used to the exclusion of the capitalization of income approach and the reproduction cost less depreciation approach. The California courts, along with the great weight of authority, have recognized the superiority of the sales approach and the relative inaccuracy of the other approaches.

5. Sections 1248.2 (a) and (b) provide that, under certain conditions, contracts to sell the property to be taken or comparable property can be used by the expert in forming his opinion as to market value. It is our recommendation that executory contracts for the sale of real property should continue to be excluded from evidence, although executed contracts for the sale of real property in which title is not passed until a later date are perfectly valid as evidence of value.

6. Section 1248.2 (b) allows an expert's opinion to be based on comparable sales within a reasonable time before and after the date of valuation. Evidence of sales made after the date of valuation should be excluded. Fair market value represents the price that a fully informed buyer would pay a fully informed seller on the date of valuation. To receive evidence of sales made after the date of valuation would require a change in this definition of fair market value.

7. Section 1248.2 (c) and (d) of the proposed statute, if adopted, would allow an expert giving an opinion as to the value of property to be taken to consider, under certain conditions, evidence of rentals of comparable property or of the property to be taken. It is inconsistent with the rule that sales are the best evidence of value to admit evidence of comparable rentals.

8. Section 1248.3 (d) precludes an expert from considering evidence of the value of property as assessed for taxation purposes. However, one factor that an informed buyer and an informed appraiser would consider in dealing with fair market value of real property is the amount of taxes paid thereon. The taxes represent the product of the tax rate by the assessed value. For this purpose, it is submitted that these items should be received in evidence.

H. Emerson W. Rhyner, Attorney, Department of Public Works, State of California

The Department of Public Works concurs with the recommendation of the Law Revision Commission except as to the material below:

1. Section 1248.1 (a) of the proposed statute provides that the owner of the property is presumed to be qualified to express his opinion. A recent California Supreme Court case, however, held an instruction to be improper which stated that an owner is presumed to know the value of his property, as it infers that the testimony of an owner is entitled to greater weight than that of other witnesses on value. Accordingly, the Department suggests that the word "presumed" not be used.

2. Section 1248.2 provides that expert opinion is admissible when based upon facts and data that a willing purchaser and a willing seller would consider. The Department is generally in accord with the objectives of this section. However, the interpretation which may be placed upon it may well permit the opinion of the expert to be based on matters which are presently prohibited. Rather than to leave the interpretation of this section wide open, the Department believes that its objective could be achieved by inserting the words "competent" and "relevant and material" in the section to modify "facts and data" which an expert's opinion can be based upon.

3. Section 1248.2 (e) and (f) provide for the capitalization and reproduction cost less depreciation methods of determining fair market value. The Department urges that sufficient language be inserted in these sections so that only improvements existing on the land at the date of valuation rather than speculative improvements could be used in a capitalization or reproduction cost less depreciation approach.

I. Frederick G. Girard, Deputy Attorney General, State of California

The Attorney General's office concurs with the recommendations of the Law Revision Commission except as to the material below:

1. Section 1248.1 (a) provides that an owner of the property to be condemned is presumed to be qualified to express his opinion. This could lead to a situation where the court might instruct the jury that the owner's testimony is presumed to be of a higher quality than that of experts.

2. Section 1248.2 provides that expert opinion is admissible when based upon facts and data that a willing purchaser and a willing seller would consider. The words "competent" and "relevant" should be inserted as a qualification on all expert opinion evidence which is offered at a condemnation trial. This would make the section conform to existing law.

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PART II REIMBURSEMENT FOR MOVING EXPENSES WHEN PROPERTY IS ACQUIRED FOR PUBLIC USE

(The Commission recommends that, subject to reasonable limitations, the owner of property acquired for public use should be reimbursed for the expense of moving his personal property off the land taken.)

Witnesses testifying in order of presentation:

A. John H. DeMoully, Executive Secretary, California Law Revision Commission (p.11)

B. Jack Merleman, Legislative Consultant, California County Supervisors Association (p.12)

C. Leslie R. Tarr, Chairman, California State Bar Committee on Condemnation (p.12)

D. Richard L. Huxtable, Acting Secretary, California State Bar Committee on Condemnation (p.12)

E. Hodge L. Dolle, Secretary, California State Bar Committee on Condemnation (p.12)

F. Richard A. Del Guercio, Deputy County Counsel, Los Angeles County (p.12)

G. Lewis Keller, Associate Counsel, League of California Cities (p.13)

H. Emerson W. Rhyner, Attorney, Department of Public Works, State of California (p.14)

I. Frederick G. Girard, Deputy Attorney General, State of California (p.15)

A. John H. DeMoully, Executive Secretary, California Law Revision Commission

The California Constitution provides that private property shall not be taken for public use without "just compensation" having first been made. The statutes and decisions implementing this provision provide that the person whose land is taken for public use is entitled to be paid only for its market value. As a result, no compensation is provided for the expense of moving to another location when land is permanently taken for public purposes.

The Commission believes that, subject to reasonable limitations, the owner of property acquired for public use should be reimbursed for the expense of moving his personal property. Inasmuch as this expense must be incurred because the land is taken for the public's benefit, the public should bear at least a substantial part of the burden imposed by reimbursing a person for moving expenses. Such a change in the law would more nearly effectuate the constitutional requirement of "just compensation". Moreover, in some instances out-of-court settlement may be facilitated, for the condemning agency will be able to reimburse a property owner for an element of damage that cannot be compensated at the present time.

Accordingly, the Commission recommends:

1. When land is taken for public use, the owners should, subject to certain limitations discussed below be reimbursed for the actual and reasonable costs necessarily incurred in moving their personal property, i.e., dismantling, packing, loading, transporting, temporarily storing, unloading, unpacking, reassembling, and installing such personal property.

2. Reimbursement cannot exceed the value of the property moved.

3. Reimbursement for the transportation element of moving expense should be provided for the first 25 miles traveled. The 25 mile limitation should not apply, however, to negotiated settlements. The condemning agency may be relied upon to protect the public interest, and settlement may be facilitated if there is no mileage limitation upon negotiated settlements.

4. When land is taken for public use for a term only, an occupant who has to move and who has a right to reoccupy the property at the end of the term should be reimbursed not only for expenses incurred in moving his personal property off the land, but also for actual and reasonable costs necessarily incurred in storing his personal property and moving it back to the land at the end of the term.

5. Where the parties cannot agree on the amount to be paid, the amount of reimbursement to be made for moving expenses should be determined as a part of the condemnation proceeding in a manner similar to that used to determine costs.

B. Jack Merleman, Legislative Consultant, California County Supervisors Association

The California County Supervisors Association is opposed to the recommendation of the Law Revision Commission. The Association endorses the statement presented by the Department of Public Works in regard to this subject.

C. Leslie R. Tarr, Chairman, California State Bar Committee on Condemnation

D. Richard L. Huxtable, Acting Secretary, California State Bar Committee on Condemnation

Mr. Tarr and Mr. Huxtable are not speaking for the State Bar.

1. Our sole recommendation with respect to moving expenses is that the proposed statutes present a workable procedure, and should be adopted; however, proposed Section 1248.3 (c), concerning admissibility of evidence of offers or options, is subject to the same objections which we previously expressed (see Part I).

E. Hodge L. Dolle, Secretary, California State Bar Committee on Condemnation

Mr. Dolle is not speaking for the State Bar.

1. It is my considered opinion that the California Law Revision Commission should not submit the present proposals on this subject. It is submitted that the payment of moving costs of personal effects of householders is the type of moving charge that should not be imposed on condemners. A real hardship is suffered by owners of commercial or industrial properties by reason of the necessity of moving, but other relief should be granted them.

F. Richard A. Del Guercio, Deputy County Counsel, Los Angeles County

1. This office opposes the reimbursement of private property owners for moving costs when property is acquired for public use. Such reimbursement would depart from the concept of fair market value now applied in compensating the owner. As just compensation an owner now receives

the fair market value of his property. Fair market value is briefly defined as the price agreed upon by willing, well-informed buyers and sellers. It is based on the prices at which properties similar to that condemned have sold. All sellers know that upon selling their property, they must move to another location. Consequently, such sales prices reflect the moving costs incurred by the sellers. So, too, does fair market value which is based on comparable sales prices.

In eminent domain proceedings the condemnee enjoys the advantage of receiving fair market value for his property without paying many of the expenses which would be incurred by him in a private sales, for instance, broker's commissions and escrow fees.

To allow reimbursement for moving costs would increase litigation to a point where public acquisitions would often become economically prohibitive.

If the Legislature were to allow for the payment of moving costs to condemnees, it would only be equitable for it to provide for a credit to the condemning agency for all increases in the value of a condemnee's property which resulted from the taking.

G. Lewis Keller, Associate Counsel, League of California Cities

1. The League of California Cities is opposed to the Law Revision Commission's recommendation in regard to compensation for moving expenses. The public has the legal duty, and is permitted, to pay only for what it receives, and may not be required to pay for something which it does not receive.

Viewed factually and dispassionately, the study made for the Law Revision Commission discloses that the vast majority of the states follow California's present rule. No statutory changes allowing a general right to moving expenses (as distinguished from narrow grants of permission to pay limited amounts in specific situations) such as that recommended by the Commission have been made by any state other than Nebraska. On the basis of these facts, it seems far more reasonable to assume that California's existing law is the nationally preferred policy, and should not be changed.

If it should ultimately be the policy of the Legislature to depart from the market value theory of condemnation and embark upon an indemnification, or tort theory of compensation, it would appear more reasonably done by authorizing such payments to be made in the first instance by the condemner, and, in the second instance, in the discretion of a court. Only in this way can the payment of windfalls in public funds be avoided.

H. Emerson W. Rhyner, Attorney, Department of Public Works, State of California

1. The Department of Public Works is opposed to the Law Revision Commission's recommendation in regard to compensation for moving expenses. When, by a change in the law, some item or items must be paid for in addition to market value, the "objective standard", which permits the application of appraisal rules and theories, is lost. This would be particularly true with regard to moving expenses, as they would depend upon a great many variables, such as the amount of personal property, the type, the distance to be moved, and a great many other factors. By reason thereof, several administrative problems of great difficulty are created. As one example, opportunities for collusion between owners, movers and public employees as to moving costs are offered which could not be checked other than by excessive supervision.

Also of great importance is the fact that an additional element of compensation is introduced concerning which there may be disagreement and, consequently, settlements will be prevented.

In the usual situation, it is believed that no great injustice results under the present law. In all acquisitions by agencies having the power to condemn, whether by negotiation or condemnation, the condemning agency pays all of the expenses which in ordinary private tranactions the seller has to bear. In most instances, these far outweigh moving costs. Included in such items are real estate commissions, in many instances title expenses, recording fees, and the like. Another important consideration is that rather than time payments, the full fair market value is generally paid in cash by the condemner.

If, however, the Legislature determines that moving costs should be paid, the Department suggests that the following amendments be considered:

2. Section 1270 (e) defines "moving" as "dismantling, removing, packing, loading, transporting, unloading, unpacking, reassembling and installing personal property". It is suggested that the definition of the word "moving" be limited to "packing, transporting and unpacking".

One of the basic problems in any moving expense allowance is the speculation involved and the lack of certainty of precisely what is and is not involved as reimbursable expenses. In the proposed statute the words "demolishing", "reassembling" and "installing" would foster numerous contentions, such as the preparing of the location to receive the property, including the renovating and remodeling of an existing building, etc.

3. Section 1270.3 limits the amount of reimbursement to the cost of transporting the condemnee's personal property 25 miles. The few states and jurisdictions which have adopted a moving expense statute have almost unanimously limited the moving to a maximum dollar amount rather than by mileage. Both mileage and dollar limitations involve

arbitrary limits. However, the dollar limitation is far more appropriate and workable, and would afford uniformity of treatment without creating further uncertainty in the amount recoverable.

4. Section 1270.7 provides that a condemner and condemnee may agree to a reimbursement figure for moving expenses without regard to the 25 mile limitation. A change should be made in this section so as to require the same limitation in a negotiated settlement as would be paid in a court-determined award. It is our feeling that a person should be entitled to receive the same compensation whether he decides to go to court or decides to settle by negotiation.

5. It is also suggested that if a moving cost statute is enacted, it be limited at first to residential property, as that is where the talked-of hardships exist and which involve by far the majority of acquisitions.

I. Frederick G. Girard, Deputy Attorney General, State of California

1. The Attorney General's office, speaking for itself and not those agencies which it represents in condemnation matters, does not oppose the policy of granting moving expenses to condemnees. The suggestions of the Attorney General relate only to clarifying ambiguities in the proposed statute.

2. Section 1270 (e) of the proposed statute defines "moving" to include "dismantling, removing, packing, loading, transporting, unloading, unpacking, reassembling, and installing personal property". This should be made more specific as it, under this section, is unclear as to what the condemning agencies' obligation is.

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PART III TAKING POSSESSION AND PASSAGE OF TITLE IN EMINENT DOMAIN PROCEEDINGS

(The Commission recommends numerous revisions of the law relating to the taking of immediate possession to protect more adequately the rights of persons whose property is taken. Moreover, the Commission recommends that the Constitution be amended to guarantee the owner the right to be compensated promptly whenever immediate possession of his property is taken and to give the Legislature the power to determine what agencies should have the right to take immediate possession and the procedure to be followed in such cases. The Commission recommends many other revisions. Among these are: Amend the statutes permitting the condemner to take possession pending appeal to provide that the condemner does not waive its right of appeal by taking possession; provide for a refund of property taxes paid by the owner that are allocable to the portion of the fiscal year following the date the condemner acquires title to or possession of the property; provide that the condemner cannot abandon condemnation proceedings if the condemnee has substantially changed his position as a result of the condemnation and cannot be restored to his original position; provide for compensating the property owner for damages he has suffered and for loss or injury to his property when a condemnation is abandoned. Moreover, if the constitutional amendment is approved, the Commission recommends that the right of immediate possession be extended to all condemners.)

Witnesses testifying in order of presentation:

A. John H. DeMoully, Executive Secretary, California Law Revision Commission (p.17)
B. Stanley E. Tobin, Attorney for Hill, Farrer and Burrill, Consultants to the California Law Revision Commission (p.17)
C. Joseph B. Harvey, Assistant Executive Secretary, California Law Revision Commission (p.17)
D. Leslie R. Tarr, Chairman, California State Bar Committee on Condemnation (p.20)
E. Richard L. Huxtable, Acting Secretary, California State Bar Committee (p.20)
F. Hodge L. Dolle, Secretary, California State Bar Committee on Condemnation (p.22)
G. Richard A. Del Guercio, Deputy County Counsel, Los Angeles County (p.22)
H. Emerson W. Rhyner, Attorney, Department of Public Works, State of California (p.24)
I. Frederick G. Girard, Deputy Attorney General, State of California (p.26)

A. John H. DeMoully, Executive Secretary, California Law Revision Commission

B. Stanley E. Tobin, Attorney for Hill, Farrer and Burrill, Consultants to the California Law Revision

C. Joseph B. Harvey, Assistant Executive Secretary, California Law Revision Commission

In certain instances the law relating to taking possession and passage of title in eminent domain proceedings is uncertain or difficult to ascertain. To remedy these defects, the Commission recommends the following revisions in the law:

Immediate Possession

Among the most important questions in this area of eminent domain law are those involving the respective rights of the parties in immediate possession cases. The Constitution of this State grants certain specified public agencies the right to take possession of property sought to be condemned immediately upon commencement of eminent domain proceedings or any time thereafter if the condemnation is for right of way or reservoir purposes. The Constitution requires the condemning agency to deposit a sum of money, in an amount determined by the court, sufficient to secure to the owner payment of the compensation he is entitled to receive for the taking "as soon as the same can be ascertained according to law".

The statutes implementing the constitutional provision provide that, at least three days prior to the taking of possession, the condemner must either personally serve on or mail to the owners and occupants of the property a notice that possession is to be taken. If the condemnation is for highway purposes, the condemnee can withdraw 75 percent of the deposit.

The Commission has concluded that the law relating to the taking of immediate possession needs to be revised to protect more adequately the rights of persons whose property is taken. Accordingly, the Commission makes the following recommendations:

1. There are now no statutes specifying the procedure to be followed in obtaining an order of immediate possession, but in practice the order of immediate possession is issued upon ex parte application by the condemner. The Commission believes that this procedure does not need to be changed, but it should be explicitly set forth in the statutes. However, the statutes should indicate that the order is not to be granted routinely.

2. At the present time, both the record owners of the property being condemned and the occupants must be notified that possession is to be taken. But the condemner is permitted to give this notice as little as three days before possession is actually taken. If the mail is delayed or if there is an intervening weekend or holiday, an owner or occupant may be deprived of possession without any advance notice.

Therefore, the Commission recommends that the condemner should not be able to take possession of the property unless the record owners and the occupants of the property are notified thereof at least 20 days prior to the date possession is to be taken. The court, however, should have the power to shorten the required notification time if emergencies arise.

3. Within the 20 day period after notice is given, the owner or an occupant of the property to be taken should be able to apply to the court for an order postponing the date that immediate possession may be taken if he can demonstrate to the court that the hardship to him of having immediate possession taken clearly outweighs the hardship that a delay may cause the public.

4. Although the Constitution requires the condemner to make a deposit and gives the condemnee the right to challenge the amount deposited, the right is of little practical value because: a) unless the property is taken for highway purposes, there is no right to withdraw any of the deposit; b) in condemnation for highway purposes, the condemnee can withdraw only 75% of the original deposit of the condemner, which may be far less than the actual value of the property or what the condemnee needs to relocate. Thus, in many cases, the condemnee must vacate the property, locate new property to replace that taken and move to the new location at a time when there is little or no money available from the condemnation. To remedy these situations the Commission recommends that the condemnee be authorized to withdraw the entire, final deposit that has been made by the condemner (the court, under the proposed statute, can order the condemning agency to increase its original deposit if such deposit is not equal to an amount which will afford the condemnee just compensation).

5. There is no provision in existing law that permits the condemnee to contest the right of the condemner to take the property prior to the time possession is taken. The Commission recommends, therefore, that the owner or the occupant of the property to be taken be given the right to contest the condemner's right to take the property by eminent domain or his right to obtain immediate possession of the property, or both, by a motion to vacate the order of immediate possession made prior to the time possession is taken.

Possession Pending Appeal

Under existing law, any condemner is permitted to take possession of the property to be condemned after entry of judgment even though an appeal is pending. However, it has been held that the condemner waives hig right of appeal by taking possession of the property. This rule seems unfair to the condemner: if the condemner takes possession, it will have to pay the award even though it is based upon an error by the trial court, but if it chooses to attack the award by appeal, a needed public improvement may be delayed for a period of years or even have to be abandoned if rising costs exceed the amount available for the construction of the improvement.

The Commission recommends that the statutes permitting the condemner to take possession pending appeal be revised to provide that the condemner does not waive its right of appeal by the taking of possession.

Passage of Title

At the present time, if immediate possession is not taken, title passes upon the recording of the final order of condemnation. However, if possession is taken prior to that time under an order of immediate possession, title passes to the condemner upon withdrawal of the deposit by the condemnee. To make rules relating to passage of title uniform, the Commission recommends that title should pass in all condemnation proceedings upon the recording of the final order of condemnation.

Compensation for Improvements

The present law relating to compensation for improvements on condemned property is uncertain. The Commission recommends that legislation be enacted providing that the condemnee is entitled to compensation for the improvements on the property on the date of service of summons unless they are removed or destroyed prior to the date the condemner takes title or possession of the property.

Property Taxes

Property taxes are prorated from the date the condemner either takes title to or takes possession of the property if the condemner is a public agency. However, under present law the condemnee loses the benefit of this proration if he has already paid the taxes and special assessments, for there is no provision for refund by the taxing authority or reimbursement by the condemner. To remedy this, the Commission recommends that provision for refund be added to the Revenue and Taxation Code.

Abandonment by the Condemner

Under existing law, even though the condemner has taken possession and constructed the contemplated improvement on the property, the condemner may abandon the proceedings at any time until 30 days after final judgment and get back the money it deposited. It is true that the condemner must compensate the owner for the use of the property and any damage to it; but the land owner who has been forced to give up this home or his business and to relocate in another area may find that it is as great a hardship to be forced, in effect, to buy back the original property as it was to be forced to move initially. The deposit may have been withdrawn and expended in the acquisition of a new location; the good will of the business may have been reestablished in the new location; or the original property may be so altered that it is no longer useful to the condemnee.

The Commission recommends that if the condemnee has substantially changed his position as a result of the condemnation and cannot be

restored to his original position, the condemner should not have the right to abandon the condemnation.

Interest

The Commission recommends the enactment of legislation which would gather the rules on interest in eminent domain cases into one section of the statutes.

Constitutional Rivision

The Commission has concluded that the provisions of the State Constitution that grant the right of immediate possession should be revised. These provisions grant the right of immediate possession only to specified public agencies in right of way and reservoir cases. As has been shown above, they do not assure the property owner, as they should that he will actually receive compensation at the time his property is taken.

Another defect in the present Constitutional provisions is that they severely limit the agencies by which and the purposes for which immediate possession may be taken. The right of immediate possession is of great value to the public, for it permits the immediate construction of needed public projects. The Legislature should, therefore, have the power to decide from time to time what agencies are to have the power and for what purposes the power may be exercised. It should not be necessary to amend the Constitution each time a change in the needs of the people of the State warrants either an extension or contraction of the purposes for which the right of immediate possession may be exercised.

Supplementary Legislation

The Commission recommends that legislation be enacted extending the right of immediate possession to all condemners to become effective if and when the Constitution is amended to permit the Legislature to determine who should have the right of immediate possession and the conditions under which the right may be exercised. The right of the condemner to take the property is rarely disputed. But despite the fact that the only question for judicial decision in virtually all condemnation actions is the value of the property, present law permits possession to be taken prior to judgment only when certain public agencies are condemning property for right of way or reservoir purposes.

D. Leslie R. Tarr, Chairman, California State Bar Committee on Condemnation

E. Richard L. Huxtable, Acting Secretary, California State Bar Committee on Condemnation

Except for minor provisions not herein included and the recommendation listed below, Mr. Tarr and Mr. Huxtable, not speaking for the State Bar,

concur with the recommendations of the Law Revision Commission.

1. We feel that the right of immediate possession is an extremely coercive force in the hands of the condemner and, therefore, should be limited as much as is possible. It is urged, therefore, that the proposed constitutional amendments should not be adopted, nor do we believe that Section 1243.4 of the proposed statute, granting the right of immediate possession to the agencies enumerated therein, should be adopted.

2. Section 1243.5 (3), among other things, permits the condemner for good cause to obtain an order permitting it to take immediate possession without having served a copy of the regular order of possession on a record owner not occupying the property. This provision is proper but should require that notice be first posted on the property.

3. Section 1243.5 (4) permits an increase or decrease in the amount of the deposit at any time. It is doubtful that the deposit should be reduced below the amount already withdrawn by the property owner. Usually the money withdrawn is used to buy a new home or place of business and is not available for refund by the owner.

4. Section 1243.5 (5) (a) permits the owner of the property to stay the order of possession when there is hardship, but it is doubtful that the owner could prepare a case to show hardship in 3 days as he might have to do under subsection (3) of the same section. To remedy this it should be provided that the court may stay the order of immediate possession until a hearing can be had on the issue of hardship for which both parties have had time to prepare.

5. Section 1243.7 (6) relieves the condemner of liability to persons who fail to object to the withdrawal of funds by other defendants, but provides that the condemner continues to be liable to owners of record who are not served with notice of the hearing. The condemner is required to give notice both to owners of record and to the occupants under Section 1243.5 (3), and it is inconsistent that the plaintiff should not incur liability by failure to give notice to such occupants under this section.

6. Section 1252.1 (1) allocated property taxes upon the date the plaintiff takes possession or the date of passage of title, whichever is earlier. This rule ignores the owner of vacant and unproductive land who is economically prohibited from putting his property to use by proposed Section 1249.1 (present effect of Section 1249) since he cannot build upon the property without losing the improvements without compensation. The same may be true as to the planting of crops. This owner is left with the bare right to pay taxes and has lost the only value his property had, the value to be put to a use. This man should not only be relieved of the obligation to pay taxes from the date of issuance of the summons, but should also receive interest from that date.

7. Section 1254 (11) provides that where a defendant has been awarded a new trial and fails to receive greater compensation in the new trial, the costs of the new trial are assessed against him. The provisio is patently illogical, and is unconstitutional.

8. Section 1255a (3) allows the owner to recover costs of preparing for trial and attorneys fees in the event of an abandonment by the condemner. But the section should further provide for recovery of costs during trial by the condemnee.

9. Section 1255 (1) (b) allows an owner, whose property has been taken under an order of immediate possession, to recover interest from "the date that possession of the property sought to be condemned is taken or the damage thereto occurs". This phrase suggests that interest will run only after physical occupancy has been taken by the condemner. The proper time for the running of interest is the date the order of possession is signed and entered, or at the very latest, on the date it is served upon the owner.

F. Hodge L. Dolle, Secretary, California State Bar Commission on Condemnation

Mr. Dolle is speaking for himself and not for the State Bar. He concurs with the recommendations of the Law Revision Commission except as to the matter below.

1. It is my opinion that the right of immediate possession should not be extended by an amendment to the Constitution, as is proposed by the Law Revision Commission.

G. Richard A. Del Guercio, Deputy County Counsel, Los Angeles County

The Board of Supervisors of Los Angeles County concurs with the recommendations of the Law Revision Commission except as to the material below:

1. Section 1243.5 (3) of the proposed statute which lengthens the period between the time the public agency desires immediate possession and the time they actually obtain possession of the property, should not be adopted. There is no necessity for a change in the present law as property owners are always given adequate notice before immediate possession is taken. Under the present system negotiations are attempted with the property owner and only if they are unsuccessful is an order of immediate possession obtained. If the proposed statute is adopted the

public agencies, due to the time lapse required, will obtain the order of immediate possession before attempting to negotiate with the property owner. This will be irritating to the property owner as he will be served with legal documents before the public agency contacts him with regard to negotiations. The result will be a decrease in out of court settlements.

2. Section 1243.5 (5) (b) allows the owner or occupant of the property to raise the issue of public use by a motion to vacate the order of immediate possession made prior to the time possession is taken. The court, under this proposal, will have to determine the issue of public use when the condemner applies for an order of immediate possessi and redetermine that issue when the condemnee raises the question under this section. But this, practically speaking, is not an issue for when a statute or the constitution allows a certain agency to take immediate possession for a certain purpose, the court will find that a public use exists.

3. Section 1243.5 (5) (a) and (6) provide that the court may delay the order of immediate possession when the condemnee is contesting the issue of hardship or public use. This is time consuming and will result in extreme delays in the construction of public improvements. At present the public agency has discretion in determining what land to condemn. As bodies like the board of supervisors are directly responsible to the electorate, they can be relied upon to see that no unfairness or hardship comes to a property owner as the result of a condemnation action.

4. Section 1243.5 (3) provides that service of an order of immediat possession upon those owners of property whose names appear on the lates secured assessment role is not adequate notice, and that service must be made on such owners as determined by other records. But the secured assessment role is the best way of determining who are the property owners. Further, the proposed statute is uncertain as to what records are to be looked to determine the record owners of property.

5. Many public agencies in this state, particularly flood control agencies, obtain federal funds, distributed through the State Department of Water Resources, for the construction of their flood control channels and storm drain projects. In these situations the federal government determines when the property is needed because they are the responsible agency for the awarding of contracts for these projects. The federal government will not award a contract until the local agency (eg. a flood control district) will certify that the property to be used for the project has been acquired. The proposed statute, under Section 1243.5 (5) (b) permits an order of immediate possession to be vacated prior to the time possession is taken. Therefore, the local agency cannot certify an absolute right to the property to the federal government as long as the possibility of vacating the order of possession is present. The federal government will not, therefore, award contracts for the project and great delays in needed public improvements will follow.

H. Emerson W. Rhyner, Attorney, Department of Public Works, State of California

With the exception of minor provisions not herein included and the material below, the Department of Public Works concurs with the recommendation of the Law Revision Commission:

1. Section 1243.5 (3) of the proposed statute provides for personal service of the order of immediate possession. The Department strongly urges that the retention of the right to make either personal service or mailing to the owners is necessary to avoid the problem and needless expense of making personal service in all cases. There is adequate protection under the 20 day period, as well as the fact that because of prior negotiations the defendants are aware that they will be required to give up possession of their property.

2. Section 1243.5 (3) also provides for the use of other records in lieu of the latest secured assessment role to determine the record owners of property. The use of the latest secured assessment role should be retained because it is one of the few sources where addresses of the owners of the property can be readily ascertained.

3. Section 1243.5 (5) (a) provides that within the 20 day period after notice is given, the owner of occupant of the property should be able to apply to the court for an order delaying the effective date of immediate possession in order to prevent "hardship".

In practical effect, this proposal could well wipe out entirely the right of immediate possession. The owner of a single small parcel of property might hold up a huge project for long periods of time, and there would be no way of recovering from him any damage done to the public interest if it were later shown that his attempts to delay were not well founded or even were motivated by unfair intentions.

Further, the Department's representatives can recall over the years no instances of complaints about the exercise of the power to obtain immediate possession.

4. Section 1243.5 (5) (b) provides that the owner or the occupant of the property has the right to contest (a) the condemner's right to take the property by eminent domain; and (b) the condemner's right to obtain immediate possession of the property by a motion to vacate the order of possession. First of all, the trial court, under present law, can vacate any order for immediate possession where it is shown that the condemner does not have the right to take the property or that the condemner does not have the right to immediate possession. Secondly should the trial court not vacate its order, there is a common law remedy for a writ of prohibition to the appellate courts. This right is more effective than an appeal, which is provided under proposed Section 1243.5 (6), because the matter can be heard and determined within a relatively short time without having the record prepared and transmitted to the appellate court. For that reason there does not appear to be any valid reason for changing the present remedy.

5. Section 1243.7 (1) allows the condemnee to withdraw the entire amount which the court has determined should be deposited. Under the present wording of the constitution and part of the theory of immediate possession is that the deposit by the condemner is security. The Department feels that since the basic theory of the deposit is security only, the amount to be withdrawn should be limited to the amount originally deposited because this is really an offer of the condemner to purchase the property at that amount. If the defendant could increase the deposit and withdraw the full amount, it would change the whole theory of an offer.

6. Section 1249 establishes the date at which the right to damages and compensation accrues. The Department suggests changes in this section to clarify the date of valuation and to bring it in line with the code sections involving other procedural matters.

The Department believes that a paragraph should be added providing for a definite date of valuation in the event of a new trial. It is felt that after a mistrial, new trial, or an appeal that the date of valuation should remain the same as that used in the first trial, provided the case is brought to trial within a reasonable time after the new trial is ordered.

7. Section 1249.1 (c) provides that improvements shall be considered in the assessments of compensation, damages and special benefits unless they are removed or destroyed before, inter alia, "(c) The time the plaintiff is authorized to take possession of the property under an order authorizing the plaintiff to do so." The Department urges that this section be deleted or amended to read as follows: "(c) The time the defendant moves from the property pursuant to an order of possession." This is necessary to protect the condemner from a loss occurring after the order is given but before the condemner can legally take possession.

8. The Department of Public Works objects to Section 1255a (2), which provides that a condemner who has taken possession of the property prior to the final order of condemnation should not, if the condemnee has relied to his detriment and cannot be restored to his former position, have the right to abandon the condemnation action. One of the principal reasons for this position is that most "abandonments" are not total abandonments but are slight changes in right of way alignments such as where by mistake the taking line has gone through a small portion of an existing building where the alignment can be drawn back to protect the improvements and minimize damages.

The property owner is adequately protected under existing case law by the doctrine of estoppel. This protection is afforded to the property owner (whether or not the condemner takes possession) where the condemner has led a property owner to believe that his property will be taken for a public use and in reliance thereon the property owner has acquired other property.

Very few total abandonments are made by the State Department of Public Works. This is because alignments for highway rights of way are usually definite and certain except for slight changes. However, this fact should not preclude the right of the State to abandon where it is required in the public interest.

9. Section 14 of the proposed constitutional amendment provides that the Legislature, not the Constitution, shall authorize a plaintiff to take immediate possession of property. The Department feels that the Commission is correct in its statement that if the right to take immediate possession of property is to be expanded, it should be done by the Legislature rather than requiring a constitutional amendment for each and every additional agency or public use. However, there does not appear to be any necessity to remove from the constitution the present two uses which are specified therein--right of way and reservoir purposes.

I. Frederick G. Girard, Deputy Attorney General, State of California

Except for minor provisions not herein included and the material below, the Attorney General's office concurs with the recommendation of the Law Revision Commission:

1. Section 1243.5 (3) of the proposed statute provides for personal service upon the owner of property as determined by records other than the latest secured assessment roll. It will take the public agency an undue amount of time to comply with this subsection; consequently, the basic purpose of an immediate possession provision will be interfered with.

2. Section 1243.5 (5) (a) provides for a stay in the order of immediate possession on grounds of hardship. There are many situations where the state acquires property for projects to be built by the federal government. In these cases the State is advised by the federal government that bids will be opened on a certain date and for the property to be available then. Under this provision, there will be many cases where the property cannot be certified as being available on a certain date and disasterous delays in important projects will result.

Further, there is no limit on the duration of the stay order. If this subsection is adopted, some reasonable limitation should be imposed.

3. Section 1243.7 (2) provides that if the condemnee withdraws a certain amount of the deposit, the court "may" require the condemnee to post security. This requirement should be made mandatory.

4. Section 1243.7 (2) also provides that the condemnee can draw down the final deposit (as distinguished from the condemner's original deposit). This is not objectionable to the Attorney General's office if some procedure is devised whereby if the Legislature has not appropriated enough money to satisfy the deposit, such money will become available without delay.

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PART IV PRESENTATION OF CLAIMS AGAINST PUBLIC OFFICERS AND EMPLOYEES

(Present statutes and charters and ordinances require the filing of a claim as a condition to suing a public officer or employee on his personal liability. The claim must be filed within a short time after the claimant's cause of action accrues. The Commission recommends that these "personnel claims statutes" be repealed.)

Witnesses testifying in order of presentation:

A. John H. DeMoully, Executive Secretary, California Law Revision Commission (p.28)

B. Joseph B. Harvey, Assistant Executive Secretary, California Law Revision Commission (p.28)

C. Richard A. Del Guercio, Deputy County Counsel, Los Angeles County (p.29)

D. Lewis Keller, Associate Counsel, League of California Cities (p.29)

E. Emerson W. Rhyner, Attorney, Department of Public Works, State of California (p.30)

F. Robert F. Carlson, Attorney, Department of Public Works, State of California (p.30)

G. John McElheney, Chief Counsel, California State Employees Association (p.31)

H. Jack Merleman, Legislative Consultant, California County Supervisors Association (p.31)

A. John H. DeMoully, Executive Secretary, California Law Revision Commission

B. Joseph B. Harvey, Assistant Executive Secretary, California Law Revision Commission

Sections 801 and 803 of the Government Code and various municipal charters and ordinances contain provisions which bar suit against a public officer or employee on his personal liability unless a claim for damages is presented within a relatively short time after the claimant's cause of action has accrued.

The Law Revision Commission recommends that all personnel claims statutes be repealed for the following reasons:

1. The effect of personnel claims statutes is to limit the substantive liability of public officers and employees by making available to them a technical defense, which other citizens do not have, against otherwise meritorious actions. Moreover, they are unnecessary because other methods that are fairer and more effective can be utilized to protect public officers and employees against having to pay judgments arising out of their personal liability for their negligent acts or omissions in the course and scope of their employment. Examples of this would be: a) defense of public personnel at public expense; and b) personal liability insurance obtained at public expense for public officers and employees.

2. The recognized justification for a claims statute is that it assures reasonably prompt notice of a potential liability to a defendant whose unique situation requires this preferred treatment. Thus, a claims statute is justified as applied to a public entity which, but for such protection, might frequently find itself sued on stale claims of which it had not theretofore been aware. But the liability of public officers and employees against which the personnel claims procedure affords protection is a personal liability based on the defendant's own negligence. There is no more justification in these cases for requiring a plaintiff to present a claim as a condition of bringing suit than there would be for imposing a similar requirement when a plaintiff sues another defendant.

3. The Commission appreciates that to the extent that statutory provisions impose liability upon a public entity to pay a judgment rendered against its officer or employee or require the public entity to provide insurance or legal representation for him at public expense, the repeal of the personnel claims statutes will negate or diminish the protection given the public entity by the General Claims Statute enacted in 1959. The Commission believes, however, that the fact that the public entity is thus involved in the suit against its officer or employee is no reason to limit his personal ability. It may be in the interest of good employee relations and hence sound public policy to require or authorize a public entity to assume all or part of the burden of such personal liability as its officers and employees may incu in the course of their public employment. But it is quite unfair to transfer this burden to the injured plaintiff.

C. Richard A. Del Guercio, Deputy County Counsel, Los Angeles County

The Board of Supervisors of Los Angeles County is opposed to the recommendations of the Law Revision Commission for the reasons listed below:

1. With the increasing size and complexity of governmental agencies and the corresponding increase in the responsibilities placed upon their officers and employees, every effort should be made to protect the servants of the government from unmeritorious or vexatious litigation rather than to facilitate their harassment or subject them to liability in cases which can be adequately defended only if prompt investigation is made.

2. The necessities for the presentation of a claim with a public officer are just as cogent as the same requirements with respect to the public agency itself. Normally where a public officer is sued the defense of the action becomes the responsibility of the public agency.

3. Public agencies own vast amounts of property which cannot be inspected as frequently as might be desired. A claims statute apprises the public agency of defects in its property, and thus indirectly assists in the protection of the public.

4. It has been suggested that it is unfair to discriminate in favor of public officers by providing this special procedural safeguard, which is not available to every defendant. This argument overlooks the great exposure to risk involved in public employment. For instance, the operator of an emergency vehicle is frequently required in the performance of his duties to exceed speed limits and disregard many of the rules of the road. Health and agriculture officers may be required to make vigorous efforts to suppress disease or pests. Highway officials, on the one hand, are required to maintain highways free of defects and, on the other hand, they may be limited as to the funds, personnel, and equipment with which to do the work.

D. Lewis Keller, Associate Counsel, League of California Cities

The League of California Cities is opposed to the recommendations of the Law Revision Commission.

It is believed that the personnel claims statutes should be made uniform and continued in effect for the following reasons:

1. City officers and employees and their city governments are entitled to reasonably prompt notice of potential individual liability because the unique situation of many of them (eg. firemen, policemen, building inspectors and many others) requires that they be given this protection against suits based on stale claims of which they had not previously been aware. Municipal employers are likewise entitled to prompt notice of claims against their employees so that they will be able to prevent future occurrences by taking remedial action either administratively or by disciplinary action directed toward accident-prone employees.

2. Personnel claims statutes create a trap for the unwary only because they are not adequately uniform, clear and available to attorneys.

3. In ultimate practical effect, repeal of the personnel claims statutes would amount to a waiver of sovereign immunity by forcing cities to insure and pay the cost of their employees liability.

If the repeal of the personnel claims statutes were made applicable only to actions for personal injuries from automobile accidents involving a vehicle used by a public agency, it would be more acceptable Here, from the very nature of the situation, the public employer will almost always receive prompt notice.

E. Emerson W. Rhyner, Attorney, Department of Public Works

F. Robert F. Carlson, Attorney, Department of Public Works

The Department of Public Works is opposed to the recommendation of the Law Revision Commission for the reasons stated below. It would not, however, be opposed to a repeal of the personnel claims statutes in the area of injuries caused by automobile accidents involving a vehicle used by a public agency. In these cases, the public employer generally has adequate notice of the public employee's possible liability.

1. The Division of Highways maintains approximately 13,000 miles of state highways, many miles of which are substandard and deficient due to lack of sufficient funds for their modernization. The employees involved in the operation of keeping the highways open are undertaking duties which often expose them and the traveling public to dangerous risks which could result in substantial tort liability.

Maintenance crews, unlike their counterpart in private industry, cannot close transcontinental and interstate highways when abnormal conditions occur. Private buildings and areas can be closed to the public in time of repair or construction, but not so with public property. In short, the exposure of such public employees to tort

liability is far greater than that of private persons.

Without limitations and conditions on personal liability, responsible persons would hesitate to accept offices and jobs with a danger of such liability arising from remote conditions over which they often have little or no control.

2. Since public agencies usually have a financial responsibility in the law suit against a public employee, it should be apprised of the circumstances upon which the plaintiff's cause of action is based.

3. Aside from the protection afforded to public officers and employees, as well as the public employer, the requirement for filing such claims also operates to protect the general public using the property by providing an opportunity to quickly remedy the alleged dangerous or defective condition.

G. John McElheney, Chief Counsel, California State Employees Association

The California State Employees Association is opposed to the recommendation of the Law Revision Commission for the reasons listed by other witnesses who have opposed the recommendation as well as the one emphasized below.

1. The public employee is exposed to a great many situations where he may have to respond in damages for his actions. Thus, he is entitled to more protection than a private employee. The public employee is so exposed because his activities constantly bring him into contact with the public (eg. firemen, policemen, etc.), and because the public agency owns so much property with which the public employee is concerned.

H. Jack Merleman, Legislative Consultant, California County Supervisors Association

The County Supervisors Association is opposed to the recommendation of the Law Revision Commission for the reasons stated by the other witnesses opposing the Commission's recommendation.

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PART V INTER VIVOS MARITAL PROPERTY RIGHTS IN PROPERTY ACQUIRED WHILE DOMICILED ELSEWHERE

Witnesses testifying in order of presentation:

A. John H. DeMoully, Executive Secretary, California Law Revision Commission

B. Joseph B. Harvey, Assistant Executive Secretary, California Law Revision Commission

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Married persons come to California and bring with them property acquired while domiciled elsewhere that would have been community property had they been domiciled in California when the property was acquired. For convenience this property can be referred to as "quasi-community property". In 1957, upon recommendation of the Law Revision Commission, legislation was enacted that treats quasi-community property substantially like community property upon the death of the spouse who originally acquired the property. The 1961 recommendation deals with how quasi-community property should be treated during the lifetime of both spouses.

The Law Revision Commission has concluded that for most purposes quasi-community property should continue to be treated like separate property. However, the Commission recommends that for three important purposes quasi-community property should be treated substantially the same as community property: (1) treatment upon divorce or separate maintenance; (2) treatment for purposes of homestead; and (3) treatment for gift tax purposes.

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PART VI RESCISSION OF CONTRACTS

Witnesses testifying in order of presentation:

A. John H. DeMoully, Executive Secretary, California Law Revision Commission

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The Commission recommends that a single, simple procedure be established to apply in all cases where rescissionary relief is sought. Under our present law there are two distinct statutory procedures for rescinding a contract. The existence of these two procedures for obtaining the same type of relief permits a plaintiff to affect seriously the rights of the parties merely by the way he drafts his complaint. The Commission has also found that the existing law relating to rescission is unnecessarily complex and confusing.

SUMMARY OF TESTIMONY PRESENTED AT A HEARING OF THE ASSEMBLY INTERIM COMMITTEE ON JUDICIARY-CIVIL ON THE 1961 LEGISLATIVE PROGRAM OF THE CALIFORNIA LAW REVISION COMMISSION - DECEMBER 1 and 2, 1960 SACRAMENTO, CALIFORNIA

PART VII SURVIVAL OF CAUSES OF ACTION

Witnesses testifying in order of presentation:

A. John H. DeMoully, Executive Secretary, California Law Revision Commission

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The Commission recommends that all causes of action survive. Some limitations on the damages recoverable would be provided by the recommended statute.